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Education Law eBulletin

A newsletter for educators.

February/March 2004

school boards and construction

Is the Labour Relations Act provision exempting non-construction employers from the Provincial ICI trades agreements unconstitutional?

The saga continues. On October 17, 2003, the Ontario Labour Relations Board issued an award stating that the Windsor-Essex Catholic District School Board, represented by Shibley Righton LLP's Brian P. Nolan, was a non-construction employer as defined in section 126 of the *Labour Relations Act*. As a non-construction employer, the school board could no longer be bound by the provincial construction agreements with respect to tendering and sub-contracting its construction work. This was the first successful application pursuant to the amendment to the *Labour Relations Act*, followed by a similar decision in favour of the Greater Essex County District School Board. The union failed in its attempt to have the OLRB reverse its decision at a rehearing.

The union filed an application for judicial review, which is pending, and a notice of constitutional question, alleging that sections 126 and 127 of the *Ontario Labour Relations Act* violate the rights of construction workers under the *Charter of Rights and Freedoms* to freedom of association. Three days of hearing of evidence on the constitutional question concluded in February 2004. The issue will be argued on the law sometime in June.

What is at stake? Well, the union's own expert evidence opined that labour costs of construction under the Provincial ICI agreements are 15% to 19% higher than rates not subject to those trades agreements. Therefore, the costs to school boards, municipalities and hospitals of having to tender and sub-contract construction only to firms which are signatory to the Provincial trades agreements are substantial, especially in these times when funding in the public sector is a problem.

We will provide updates as the legal proceedings continue.

recent court decision

Supreme Court of Canada rules on section 43 of the Criminal Code

The Canadian Foundation for Children, Youth and the Law ("CFC") commenced an application for a declaration that section 43 of the *Criminal Code* (the "Code"), which excludes reasonable physical correction of children by their parents and schoolteachers from the assault provisions of the Code, violated sections 7, 12 and 15(1) of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The application was rejected by the trial judge and the Ontario Court of Appeal and was subsequently appealed to the Supreme Court of Canada.

On January 30, 2004, a 6-3 majority of the Supreme Court of Canada dismissed the appeal, holding that the section 43 exemption from criminal sanction for corrective force that is "reasonable in the circumstances" does not violate the Charter. The decision significantly restricts the circumstances in which the use of force against children will be protected by section 43, however. These restrictions, particularly the outlawing of corporal punishment by teachers, reflect a position that is largely consistent with the views of most school boards and with the position that has been maintained by the Canadian Teachers' Federation for several years now.

Section 43 of the Code states:

"Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances."

Historically, courts throughout Canada were unable to establish a consistent precedent by which to evaluate the reasonableness of a section 43 defence against a charge of assault. In some cases the judge even resorted to comparing the discipline imposed on the child to what he or she would have received from his or her own parents for the same offence. It was against this background of uncertainty that CFC commenced its application for a declaration that section 43 violated the Charter.

Continued ...

Section 43, continued

Section 43 provides that the force used must be “reasonable in the circumstances”. What is reasonable must be measured by an objective standard, and force which causes harm to the child or raises a reasonable prospect of harm will not be considered reasonable. The focus of the force must always be on the **correction** of the child. Therefore, force employed in the absence of any behaviour requiring correction cannot, by definition, be corrective.

Based on this analysis, the Supreme Court placed the following limits upon the use of force under section 43:

- corporal punishment cannot be used against children under two years of age because of their cognitive limitations;
- corporal punishment cannot be used against teenagers because it can induce aggressive or antisocial behaviour and therefore will not be protected by section 43;
- corporal punishment using objects, such as rulers or belts, is physically and emotionally harmful and therefore is prohibited;
- degrading, humiliating, or inhuman conduct will not be protected;
- corporal punishment involving slaps or blows to the head is prohibited; and
- the use of corporal punishment by teachers is not acceptable.

The Supreme Court explained that section 43 will protect a teacher who uses reasonable, corrective force to restrain or remove a child in appropriate circumstances. As an example, teachers may reasonably apply force to remove a child from a classroom or secure compliance with instructions, but not merely as corporal punishment.

After reviewing the decision at length, it is clear that while section 43 remains a viable defence for parents and teachers to some allegations of assault, the availability of the defence has been significantly curtailed by the decision of the Court. In particular, teachers need to carefully inform themselves about the narrowed circumstances in which the use of force against a pupil under section 43 is permitted.

income tax

Deductibility of teacher’s supplies

A teacher may deduct amounts paid during the year for various stationary items (other than books) such as pens, pencils, paper clips and charts.

Teachers must provide certification from their school board that the conditions for deducting certain expenses have been met. This is done by filing the prescribed form with their income tax return. Specifically, a school board must certify in Form T2200, Declaration of Conditions of Employment, that:

- amounts paid for supplies by the teacher during the year were consumed directly in the performance of the duties of the teacher; and
- that the teacher was required by the contract of employment to supply and pay for such supplies.

According to the CRA Interpretation Bulletin IT-352R2, such written terms within the contract of employment are not necessary if the teacher can establish that it was tacitly understood by both parties (the teacher and his or her school board) that such payment for supplies was to be made by the teacher and was, in fact, necessary under the circumstances to fulfill the duties of the employment.

If Form T2200 is not physically filed with the return of income, such as when the return is filed electronically, it should nevertheless be retained and be readily available as the Department has the authority under subsection 220(2.1) of the *Income Tax Act* to subsequently request it as proof of the claim being made or in support of the information being reported.

case law

Cummins v. Ontario Public School Teachers’ Federation

Ontario Superior Court of Justice

The Court dismissed an application to force the union to pay the applicant’s legal fees in a criminal matter as the applicant failed to demonstrate that the criminal charges related to his duties as a teacher.

Stagg v. Lewisporte-Gander School District No. 6

Newfoundland and Labrador Supreme Court

The Court dismissed an action on summary judgment as the plaintiff had not presented sufficient evidence of an implied contract requiring the defendant to indemnify her in her position as a volunteer school trustee.

Paterson v. Etobicoke (City) Board of Education

Ontario Superior Court of Justice

The Court directed an estate trustee to pay the deceased’s bequest to the Toronto District School Board because, in law, it was the successor to the Etobicoke Board of Education.

Ontario College of Teachers v. King

Ontario College of Teachers

The College suspended the license of one of its members for the maximum length of time possible after the member was found to have accessed student pornography websites using school computers.

London District Catholic School Board v. Ontario English Teachers’ Assn. (Gordon Grievance)

An arbitrator refused to review the decision of the school board regarding the grievor’s placement on the wage grid as the collective agreement provided that such decision was in the sole discretion of the board, and the decision itself had been made in good faith.

Summaries of these cases and others can be found in the Shibley Righton Education Law NetLetter published by Quicklaw. Visit www.quicklaw.com.

We welcome your comments and questions. Send them, and any updated contact information, to byrdena.macneil@shibleyrighton.com. If you wish to unsubscribe to this eBulletin, please send a blank e-mail to unsubscribe@shibleyrighton.com

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